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No. 02-241

In The Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents,

and

KIMBERLY JAMES, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

The University of Michigan Law School ("Law School") respondents pay repeated tribute to the manner in which the Law School "engages in a highly individualized, holistic review of each file, and gives serious consideration to all of the ways that applicants might contribute to a diverse educational environment." Resp. Br. 46. *See also id.* at 4, 5, 9, 11, 12, 13, 32, 43, 48. Yet, in their 50-page, 80-footnote brief, respondents mention only once by name the individual who filed this suit, and then the reference is a disparaging one. *See* Resp. Br. 47-48 n.78. One could not learn from their brief that Ms. Grutter's application to their Law School described, in addition to her academic achievements, Pet. Br. 2, a 43-year-old mother and business entrepreneur, someone who had started her own business ten years earlier and made it successful, someone who had been a "first" in many of her professional achievements, and someone interested in non-traditional methods of education. *See* Cir. App. 284-92. These life experiences would have brought a substantial amount of genuine diversity to a law school class composed largely of students (of whatever race or ethnicity) who come to the school directly from college.

Far from mentioning her diversity characteristics, and in the face of their repeated claim to consider and value many "subjective non-racial diversity factors," Resp. Br. 11, respondents even dismiss out-of-hand (prior to a trial on the issue) the prospect that Ms. Grutter could be admitted to their Law School. They reach that conclusion *solely* by reference to the fact that other rejected white applicants had the same or better grade point averages and LSAT scores as she. *Id.* at 47-48 n.78. The Law School could not be clearer in demonstrating what trivial value it places on these "subjective non-racial diversity factors," especially in relation to skin color diversity, the only kind of diversity for which it has a "commitment" to obtaining a "critical mass." App. 120-21.

The interest that respondents ask this Court to recognize as a compelling justification for departing from the command of equality contained in the Constitution is indistinguishable from an interest in simple racial balancing. It is a racial quota palmed off as an ethereal "educational concept." Resp. Br. 32 n.50. What respondents ask for is an exception to the nondiscrimination principle for educators, so that they can decide, with virtually unfettered discretion, what kind and quantity of racial mix to assemble in our colleges and universities and what weight to assign a "plus" and (by implication) a "minus" on the basis of immutable racial characteristics. The Court has never before approved such a standardless justification for racial discrimination under the exacting requirements of strict scrutiny. It should not do so now.

I. The Law School's Use of Racial Preferences in Student Admissions Violates the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 2000d (Title VI), and 42 U.S.C. § 1981.

A. The Law School's Racial Preferences Are Not Supported by a Compelling Governmental Interest.

1. This Court and individual Justices have repeatedly emphasized that state-sponsored racial preferences impose real harms and costs on the individuals affected by them and society at large.[1] A departure from the command

[1] *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("[T]he use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions."); *id.* ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."); *Shaw v. Reno*, 509 U.S.

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of equality contained in the Equal Protection Clause can be justified only in an "extreme" case, and then only when necessary as a temporary means to accomplish a compelling objective. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (O'Connor, J.); *see also id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment) (noting that "strict scrutiny . . . forbids the use even of narrowly drawn racial classifications except as a last resort"); *Shaw v. Reno*, 509 U.S. 630, 644 (1993) (racial classifications require "extraordinary justification"). This high threshold has meant that even many laudable goals, like remedying the effects of societal discrimination or providing role models for minority school children, cannot justify a state's use of racial preferences. They deprive innocent individuals of their "personal rights," guaranteed by the Fourteenth Amendment, "to be treated with equal dignity and respect." *Croson*, 488 U.S. at 493 (O'Connor, J.); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280-82 (1986) (plurality opinion).

Yet, nearly fifty years after *Brown v. Board of Education*, 347 U.S. 483 (1954), respondents ask this Court to endorse the use of racial preferences in higher education admissions until "disparities" in educational qualifications among races caused by "our Nation's discriminatory past have been eliminated." Resp. Br. 15. Acceptance of respondents' indefinite justification for racial preferences in higher education, expressly linked as it is to effects "rooted in centuries of racial discrimination," Resp. Br. 33, would mark a momentous step backwards in this Court's

630, 643 (1993) (racial preferences "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility"); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 637 (1990) (Kennedy, J., dissenting) (criticizing majority for not being "candid about the existence of stigma imposed by racial preferences on both affected classes, candid about the 'animosity and discontent' they create, and open about defending a theory that explains why the cost of this stigma is worth bearing and why it can consist with the Constitution") (citation omitted).

"[m]odern equal protection doctrine." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting). Instead, the Court "should tolerate no retreat," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), from its precedents by rejecting as "insufficient and over expansive" a basis for imposing racial preferences that is defined in time and scope by progress made in ameliorating the persistent effects of societal discrimination.[2] *Wygant*, 476 U.S. at 276 (plurality opinion).

2. The timeless quality of the Law School's asserted interest is matched by its ill-defined and amorphous nature. For the Law School, it is enough to justify large, indefinite racial preferences in admissions by positing that there are some unmeasured educational benefits to be obtained by assembling in the student body what, in the Law School's sole discretion, it considers to be a "critical mass" of students from certain specified racial and ethnic groups. Under its approach, it is not necessary to ascertain whether the dangers and harms, in the nature of stigma, racial hostility and division, and perpetuation of stereotypes, outweigh the asserted educational benefits. It is not even necessary under the Law School's mode of analysis to assess (since it never does) whether the claimed benefits attributed to the preferences, *i.e.*, that which is over and above what would be produced by the level of diversity in the absence of preferences, outweigh their harms and costs. Quite clearly, to the Law School, a "compelling"

[2] Tying justification of the Law School's racial preferences to educational disparities caused by historical race discrimination presents intractable problems. For example, it would require some means of assessing whether, and to what extent, such disparities are caused by historical race discrimination rather than by other factors so that the preferences could be narrowly tailored accordingly. The Law School offers no explanation for how these assessments are to be made or who is to make them (presumably separately for different groups, since circumstances may vary among them). Perhaps this is because respondents are testing the waters with this argument for the first time in the more than five years that this case has been pending.

interest for racial preferences is merely one that it believes produces some social benefit (whether or not there is a net gain). That simply does not satisfy the demanding requirements of strict scrutiny.

The educational claims that the Law School makes for having a "critical mass" of minority students are no better defined than the educational claims asserted in defense of the racial preferences struck down in *Wygant*. Notwithstanding respondents' denial to the contrary, *see* Resp. Br. 31 n.48, the Jackson Board of Education in *Wygant* most certainly *did* argue that its racial preferences were justified in part by the *educational benefits* of racial diversity – in that case, diversity of the faculty.[3] In its brief to this Court, the Board explained:

> The Jackson Board was convinced that the presence of black teachers would bring an important perspective to students and faculty, and that such a diverse faculty would be able to relate valuable experiences and bring new perceptions to the classroom that would contribute to the students' total educational experience and add a needed balance to the faculty curriculum.[4]

[3] The right of an educational institution to choose "who may teach" is one of the "four essential freedoms" identified by Justice Frankfurter in his opinion quoted by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

[4] Brief of Respondents in *Wygant*, 166 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 119-20 (Philip B. Kurland and Gerhard Casper eds. 1987); *id.* at 118-19 ("The Jackson Board . . . was concerned both with educational values and the remedial need to integrate."); *id.* at 119 ("The Jackson Board concluded that white students should be exposed to black teachers and should be prepared to participate in a multi-racial society."); *id.* at 120-21 ("If a state university has a compelling interest in admitting a racially diverse student body, it would seem that a local school board has at least as compelling an interest in attempting to secure a racially diverse faculty.") (footnote omitted). Throughout its brief, the Board

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Both the "role model" theory articulated in *Wygant* and the diversity rationale put forth by respondents here are predicated on a theory that increased minority representation (whether in the faculty or student body) produces educational benefits. *See Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) (noting that purpose of seeking multi-ethnic representation on the teaching faculty was "completely sound educational purpose"). There is "no logical stopping point," *Wygant*, 476 U.S. at 275 (plurality opinion), for either of these educational justifications for racial preferences, as they are not measured with respect to the accomplishment of any identified remedial purpose and "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 276 (plurality opinion)). There will always be some racial or ethnic group that is "underrepresented" to an extent that it does not have a "critical mass," so that there will be a need for the kind of "year-to-year calibration," in effect, racial balancing, that is also inherent in the rejected role model theory. *Wygant*, 476 U.S. at 275 (plurality opinion). Hence, the conclusion that the Law School's asserted interest in racial diversity (*i.e.*, "critical mass") is not capable of being the most compelling of reasons that it must be to survive strict scrutiny is fully supported by the compelling-interest analysis contained in the Court's precedents, including *Croson* and *Wygant*.

3. The same conclusion can be derived from the way in which the Law School's stated interest in diversity is premised on stereotypes and the use of race as a proxy for viewpoint, notions that the Court and individual Justices

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relied on Justice Powell's articulation in *Bakke* of the diversity rationale in defending the legitimacy of the Board's preferences and educational goals. At oral argument in this Court, counsel for the Board referred in some form to "diversity" no fewer than nine times. Oral Argument of Mr. Jerome A. Susskind, quoted in 166 LANDMARK BRIEFS 636, 637, 638, 640, 643, 645, 646.

have rightly condemned as antithetical to the principle of equality. Respondents vacillate back and forth between arguing, on the one hand, that mere racial status is enough to assure that a particular minority will have viewpoints and perspectives of a kind particularly valuable to the Law School, *see, e.g.*, Resp. Br. 24-25; App. 120 (Law School policy statement that members of the "historically discriminated against" racial groups are considered to have "experiences and perspectives" of "special importance" to the Law School's mission), and on the other hand, acknowledging as a "fiction that race determines a person's 'belief and behavior.'" Resp. Br. 30 (footnote omitted) (citing *Metro Broad.*, 497 U.S. at 618 (O'Connor, J., dissenting)).

These two rationales are at war with one another. If race does not determine "belief and behavior," it makes no sense to *assume,* based on nothing other than racial status, that a member of a particular minority group will have experiences or perspectives ("beliefs") of "special importance" to a school's mission. Moreover, *neither* of these rationales can be a legitimate foundation for respondents' racial preferences. Drawing racial classifications on the premise that minority status can be equated with viewpoint is undisputedly an impermissible basis for drawing racial classifications. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 914 (1995). Yet, if the Law School genuinely recognizes that race does not "determine[ ] a person's 'belief and behavior,'" Resp. Br. 30, then the logic of its justification for granting a racial preference as a means of getting viewpoint diversity collapses entirely.

It is no defense to respondents' asserted use of race as a proxy for viewpoint that they abjure the notion that there is "some characteristic minority viewpoint on any issue." *Id.* The same point was made with respect to the FCC's use of racial preferences in the award of broadcast licenses to increase diversity of minority viewpoints in *Metro Broadcasting*. 497 U.S. at 582 ("[W]e are under no illusion that members of a particular minority group share some cohesive, collective viewpoint."); *id.* at 579 ("The predictive judgment about the overall result of minority

entry into broadcasting is not a rigid assumption about how minority owners will behave in every case. . . ."). Respondents' argument here is essentially that use of race as a proxy for viewpoint will somehow "in the aggregate, result in greater [viewpoint] diversity." *Id.* at 579. This reasoning reveals the extent to which respondents' asserted interest is not compatible with the demands of strict scrutiny. *Id.* at 620 (O'Connor, J., dissenting) ("This reliance on the 'aggregate' and on probabilities confirms that the Court has abandoned heightened scrutiny, which requires a direct rather than approximate fit of means to ends.").

There are other pernicious stereotypes that underlie respondents' use of race as a proxy allegedly to promote viewpoint diversity. One is the assumption that the experiences of particular racial groups are of such importance and relevance that they justify granting preferences in admissions to members of these groups. "The corollary to this notion is plain: Individuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity." *Id.* at 619. A second stereotype is found in respondents' assumption that many or most white students believe that all minorities think alike. *See Amicus Curiae* Brief of Law Professors Larry Alexander, *et al.* 14. Even if these questionable and unattractive propositions have "some empirical basis, equal protection principles prohibit" respondents from relying on them to justify their racial preferences. *Metro Broad.*, 497 U.S. at 620 (O'Connor, J., dissenting).

4. In arguing that a majority in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), endorsed the Law School's diversity rationale, respondents have instead cobbled together their own separate rationale that *none* of the Justices in *Bakke* endorsed. They do so by linking and limiting the legitimacy of the diversity interest to remedial purposes – the use of race "must cease" under a policy like the "Harvard plan" when "the disparities in applicants' numerical qualifications produced by our Nation's discriminatory past have been eliminated." Resp.

Br. 15. Nowhere in his opinion did Justice Powell define the diversity interest in such terms or limit it to any remedial context, and he expressly repudiated the effects of societal discrimination as a basis for justifying preferences. *Bakke*, 438 U.S. at 307 (Powell, J.). Similarly, it requires resort to speculation and a re-write of Justice Brennan's opinion to conclude that what he "mean[t]" by the "lingering effects of societal discrimination" was "disparities in applicants' numerical qualifications." Resp. Br. 15.

Respondents' argument that there is a limitation on the diversity rationale that is contained only in Justice Brennan's opinion is also inconsistent with their argument that Justice Powell's opinion is the "narrower" one under the analysis approved in *Marks v. United States*, 430 U.S. 188 (1977). In effect, respondents are now arguing that it is *Justice Brennan's opinion*, with its remedial rationale, that is controlling. Indeed, Justice Powell's nonremedial articulation of the diversity rationale becomes superfluous under respondents' reasoning, which has it that in the absence of the effects of lingering discrimination, racial diversity could be achieved *without* resort to racial preferences. Resp. Br. at 15-16 (noting that "a racially diverse class could then be assembled by other means," *i.e.*, without "considering race"). The absurd result produced by respondents' contortionist interpretation of the opinions is that Justice Brennan's opinion, which mentions no interest in diversity,[6] marks the limits of that interest in remedial terms, even though Justice Powell, who alone in *Bakke* articulated the diversity rationale, in no way confined it to the remedial context.

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[6] Justice Brennan's brief references to the "Harvard plan" were in a context that limited any endorsement of the use of race in such a plan to circumstances justified by past discrimination and a showing of disadvantage on the part of a minority applicant, *Bakke*, 438 U.S. at 316 (Brennan, J.), limits which are absent from the Law School's admissions program. Thus, whatever the "Harvard plan" (which, of course, was not before the Court in *Bakke*) may have been in reality, Justice Brennan and those Justices who joined his opinion viewed it as a *remedial* plan.

Ultimately, both sides can cite to law review commentary and court cases for their opposing positions on what meaning emerged from various opinions in *Bakke*.[6] Given the fractured nature of those opinions, as noted by all the Justices of this Court, *see* Pet. 28, and the sharp division among the lower courts, *id.*, it is hard to fathom how respondents can genuinely persist in contending that their view represents either "obvious" or "settled" law.[7] Resp. Br. 16-17.

5. In the end, the Law School's assertion of a compelling interest boils down to its incendiary canard that the Law School and others like it will become "resegregated" if they must discontinue their use of racial preferences in admissions. Resp. Br. 13, 19-20. By "resegregation," respondents do not mean that minorities will be intentionally excluded. Rather, the provocative term is used to indicate that these schools will admit fewer students from the currently-favored minority groups than is the case under the current race-based regime. Even then, respondents have painted a false or wildly exaggerated picture. This can be seen in empirical evidence from the admissions offices of selective law schools that have for several years operated under a rule foreclosing use of racial preferences in admissions. This year's first-year class at Boalt Hall School of Law, which by common repute is as

[6] The Law School contends that it was "immediately obvious" after *Bakke* that Justice Powell's diversity analysis was controlling. Resp. Br. 16-17. In fact, a number of courts either explicitly rejected this conclusion, expressed doubt about it, or read Justice Brennan's four-Justice plurality opinion as containing the controlling rationale. *See, e.g., Britton v. South Bend Comm. Sch.*, 775 F.2d 794, 803 n.12, 809 (7th Cir. 1985); *Valentine v. Smith*, 654 F.2d 503, 509 & n.9 (8th Cir. 1981); *United States v. City of Miami*, 614 F.2d 1322, 1337-38 (5th Cir. 1980).

[7] For additional arguments addressing respondents' erroneous contention that principles of *stare decisis* furnish a reason to accept Justice Powell's articulation of the diversity rationale in *Bakke* as binding or "settled," *see* Petioners' Reply Brief 7-10, in *Gratz v. Bollinger* (No. 02-516).

selective as respondents' Law School, has 19.9% representation from the "underrepresented" (African American, Hispanic, Native American) groups, a percentage substantially exceeding the "critical mass" that respondents typically ensure through use of their preferences.[8] For the last several years, Boalt's enrollments from these racial groups have been comparable to the enrollments at respondents' school, and there is no indication that it employs any "percent" plan or has significantly diminished its commitment to "academic selectivity." A similar situation exists at the law schools at the University of California at Davis,[9] UCLA,[10] and the University of Texas.[11] The numbers belie respondents' casual prophecies about "resegregation" and assertion that race-neutral alternatives are unavailable for highly selective professional schools.[12]

[8] *See* http://www.ucop.edu/acadadv/datamgmt/lawdata/lawschl3.html. The first-year enrollments at Boalt from the "underrepresented" groups totaled 10.7% in 2001, 9.7% in 2000, 9.2% in 1999, and 12.3% in 1998. *Id.*

[9] 16.3% in 2002; 8.9% in 2001; 8.9% in 2000, 12.4% in 1999, and 9.3% in 1998. *See* http://www.ucop.edu/acadadv/datamgmt/lawschl3.html.

[10] 12.9% in 2002; 12.9% in 2001; 12.1% in 2000; 7.5% in 1999; and 9.8% in 1998. *Id.*

[11] 14.2% in 2002; 12.8% in 2001; 12% in 2000; 10.1% in 1999; and 12.5% in 1998. *See* http://www.utexas.edu/academic/oir/statistical_handbook/02-03/students/s04b/. The trial court record also includes evidence on the admissions data from California and Texas schools available as of that date. Cir. App. 5123, 5125, 5127, 5129.

[12] Rather than basing their predictions on real world experience, respondents rely on their own self-serving computer models, which make assumptions far beyond removing the use of race in the admissions process. These assumptions are that in a race-neutral admissions system, the Law School will consider *only* test scores and grades, that it will admit students *strictly* in rank order of these credentials, and that other schools will continue to use racial preferences. Resp. Br. 6 & n.7. Such a system would be completely different from the one they claim to operate now, in which each file receives "highly individualized, holistic," *id.* at 46, review and in which many "subjective, non-racial diversity factors" are considered. *Id.* at 11. Moreover, even under respondents'

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6. To the extent the intervenor respondents make substantive arguments[13] different from the Law School respondents, they are undisguised appeals to justify the Law School's preferences on grounds of societal discrimination. Their contention is not that there is a history of any identified, purposeful discrimination in admissions by the Law School against the minority groups that receive a preference. Rather, it is that an admissions system that relies on criteria of grades and test scores is biased against minorities.

First, contrary to intervenors' misstatement, Resp. Interv. Br. 38 ("plaintiff embraced" test scores and grades), it is not petitioner who insists that the Law School use any particular admissions criteria. It is the Law School that has chosen, as it explains at length in defining "academic selectivity," to rely heavily on these "numerical qualifications."[14] Resp. Br. 5-6. Second, intervenors do not argue

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modeled worst-case scenario, there would still be representation from the "underrepresented groups" in the class, so that it is inaccurate to describe the result as "resegregation." Accordingly, the interest that respondents defend here is not one of "integration," Resp. Br. 1, 14, 22, because the Law School will certainly remain integrated after its preferences are found unlawful. Rather, the interest that respondents seek to elevate to the status of "compelling" is one in "racial balancing," *Croson*, 488 U.S. at 507, which is simply "discrimination for its own sake." *Bakke*, 438 U.S. at 307 (Powell, J.).

[13] Intervenors direct numerous *ad hominem* attacks at petitioner, her counsel, and statistical expert. The brief is also replete with misleading statements or assertions made without benefit of citation. Thus, for example, intervenors falsely state that the district court "conceded that the elimination of affirmative action at the Law School would result in an immediate reduction in underrepresented minority enrollment of over 73 percent. [Pet. App.] 223a." Resp. Interv. Br. 6. In fact, at the point referenced by intervenors, the district court merely recited the testimony of a Law School witness, only to subsequently *reject it*. Pet. App. 228a. *See also* Resp. Interv. Br. 36 (asserting that Florida established "two new state law schools [in 2000] – one for black students and one for Latinos").

[14] To the extent that the intervenor respondents rely on defenses of the Law School's racial preferences that did not actually motivate the

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that the numerical criteria fail to predict, for minorities as well as others, what they are designed to predict: first-year grades.[15] Third, if these indicators are biased and are not educationally justified, then they should be eliminated, not race-normed. Intervenors cite no case for the proposition that criteria shown to be biased should be used *anyway* in conjunction with a preference to offset the bias. Indeed, the courts that have addressed this argument have appropriately rejected it. *See Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (en banc) (citing *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir. 1993) (en banc)); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1572 (11th Cir. 1994).

B. The Law School's Racial Preferences Are Not Narrowly Tailored.

1. Respondents' conception of ensuring enrollment of a "critical mass" of students from the preferred racial and ethnic groups is not functionally different from the formal quota employed by Davis in *Bakke*. Just as the seats set aside by Davis were available *only* to members of specified races (albeit only disadvantaged individuals), *only* members of certain racial or ethnic groups can contribute to the "critical mass" that respondents' policies are designed to attain. Barbara Grutter, solely because of her race, is ineligible to be considered for a space in the class based on contribution to "critical mass." The concept describes a category "reserved exclusively for certain minority groups," *Croson*, 488 U.S. at 496 (O'Connor, J.), and from

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Law School to adopt them, these defenses are legally insufficient to justify them. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996); *United States v. Virginia*, 518 U.S. 515, 535-36 (1996).

[15] The evidence in the record is that they are valid predictors for this purpose. Cir. App. 7500-02. *See Washington v. Davis*, 426 U.S. 229, 250 (1976) (test for entry into police training program could be correlated with success in the training program rather than success as a police officer).

which members of other racial groups are "totally excluded." *Bakke*, 438 U.S. at 319 (Powell, J.).

It is also undisputed that "mass" means numbers and that "critical" means numbers *sufficient* in respondents' judgment. Attainment of the objective of "critical mass" is hence measured in the same manner one would measure whether a quota has been filled – with reference to whether the numbers achieved fall above or below the desired objective. Given that the concept of "critical mass" as defined by respondents is inherently tied to a focus on producing sufficient numbers ("meaningful numbers," Resp. Br. 4) of the preferred minority students, it is hard to understand how respondents can protest when it is simply pointed out that the actual admissions data confirm the consistent accomplishment of the numerical objective.

It is not tenable to suggest that there should be a constitutionally significant distinction between a system that sets aside a "fixed" number of spaces in the class and one that is designed to ensure that some approximate range of spaces are to be filled by a racially defined "critical mass." The distinction that respondents try to make between "quotas" and "goals" is beside the point because it is disingenuous for them to suggest that their concept of "critical mass" merely represents "aspirational goals" or a "hope." Resp. Br. 38-39, 42. The Law School's policy mandates enrollment of a "critical mass" of students from the preferred minority groups, and its admissions officers understand that they are required to comply with the policy, as they do each year.[16] The respondents' disagreement about whether there is in fact a numerical range that represents "critical mass" is a disagreement with the

[16] The policy describes a "commitment" to "ensuring" enrollment of a critical mass each year. App. 120-21. Respondents' admissions director testified that she considered this to be a mandate. Cir. App. 7250.

district court's findings, which are supported by the testimony of the Law School's witnesses, documents, and admissions data,[17] and are certainly not clearly erroneous.

2. While "critical mass" describes the result that the Law School seeks to achieve with its preferences, it is necessary to examine the *size* of the preference to understand *how* respondents achieve their desired objective. In *Bakke*, the racial objective was attained through a separate minority admissions committee that decided who received one of the 16 reserved places in the class. In this case, respondents instead use separate admissions standards to accomplish their objective.

It is no exaggeration to describe the size of the Law School's "plus" for race as "staggering" or to conclude that the data reveal "shocking" comparisons of admissions outcomes in many cases. Pet. App. 133a (Boggs, J., dissenting). On the criteria that the Law School admits are important (and that define for them "academic selectivity"), comparably qualified students from different racial groups have such systematically different admission probabilities that there can be no denying the existence of a "two-track" system. It defies understanding how respondents can call these differences "modest," especially in those frequent cases when admission rates for members of the favored minority groups are 80% to 100%, compared to 20% and lower for members of other groups with the same or similar numerical credentials. *See, e.g.*, App. 156-203; Pet. App. 312a-319a. Respondents' lack of candor on this point is also shown in their willingness to argue two

[17] *See* Pet. Br. 4-10. Respondents contend that variations in the admissions data across years are inconsistent with the notion that "critical mass" constitutes the "functional equivalent" of a quota. As Judge Boggs noted in his dissent, some variation in enrollment numbers is to be anticipated since respondents do not have complete control over yield. Pet. App. 142a n.29.

contradictory notions – that race is only a modest consideration in its system and that removal of just that one factor will cause "resegregation." Resp. Br. 43-44.

Respondents ultimately, however, all but concede that they operate a race-based two-track system by describing their dual objectives of "academic selectivity" and racial diversity. *Id.* at 1. At this point, they even abandon the pretense of identifying their diversity interest in terms of intellectual or experiential diversity. They make clear that applying to the preferred minority students the same standard on "numerical qualifications" under which 90% of white students are admitted would prevent respondents from achieving their racially-defined "critical mass." *Id.* at 5. This could not be a clearer acknowledgment of the two-track nature of the admissions standard.

3. Respondents' use of race in its system is not remotely like the "individualized, case-by-case" consideration that Justice Powell spoke of approvingly as part of an effort to obtain an intellectually diverse class. *Bakke,* 438 U.S. at 319 n.53 (Powell, J.). While respondents suggest that the extent to which race matters may vary depending on individual circumstances, *see* Resp. Br. 37, the policy which they defend is premised on an *a priori* judgment that the racial status of the groups they prefer equates with experiences and perspectives on which the Law School places a special importance. There is no reason to conclude that the Law School could not consider a particular applicant's personal experiences, on an individualized basis, even experiences that are associated with race. But respondents' approach is one in which race is simply used as a proxy for experiential diversity.[18] Because respondents consider the mere "experience" of being a member of one of the preferred racial groups a valuable contribution to

[18] Respondents practically concede as much; it is just that they consider race to be a very good proxy, "if not perfect." Resp. Br. 30.

educational diversity, the dissenters had it just right in describing the system as one in which race is a "proxy for race." Pet. App. 121a (Boggs, J., dissenting).

By treating Justice Powell's statement that the "weight attributable to a particular quality may vary from year to year," *Bakke*, 438 U.S. at 317-18 (Powell, J.), as a license to treat race as a special category, respondents demonstrate that their real interest is racial balancing. No other type of diversity in respondents' system is identified as having importance sufficient to require a "critical mass."[19] While members of the racial groups preferred by the Law School are presumed to have experiences and perspectives worthy of a preference, members of other racial groups are "considered to be part of a homogeneous (and 'over-represented') mass." App. 122a (Boggs, J., dissenting).

4. Respondents offer empty solace in the assurance that their use of racial preferences imposes on those groups that do not receive a preference a "small and 'diffuse'" burden which "barely affects their chances at all." Resp. Br. 47. The same was true in *Bakke*, where invalidating the system opened up only 16 seats for the more than two or three thousand applicants from the disfavored groups. *Bakke*, 438 U.S. at 273 n.2, 275 n.5 (Powell, J.). According to the Law School, those students denied admission because of their race can attend school elsewhere. Resp. Br. 48. *But see Metro Broad.*, 497 U.S. at 630 (O'Connor, J., dissenting) ("It is no response to a person denied admission at one school, or discharged from one job, solely on the basis of race, that other schools or employers do not discriminate."). Of course, the same could be said of those individuals from the preferred minority races who would not receive offers of admission from respondents in a nondiscriminatory admissions system. Respondents' argument is just one more instance

[19] Moreover, the Law School certainly does not track other kinds of diversity on a daily basis in the admissions season, like it does for racial diversity.

of how their conception of our Constitution is one that protects the right of racial groups, not individuals.

5. Finally, as the district court found, "there is no time limit" on respondents' use of preferences. Pet. App. 247a. Their suggestion that the preferences will come to an end some day merely confirms that the planned duration is indefinite, as would be any time limit defined, as respondents now define it, with reference to the lingering effects of societal discrimination. Resp. Br. 31.

C. The Law School's Racial Preferences Violate 42 U.S.C. § 1981.

Respondents assert without elaboration that petitioner did not preserve an argument that she is entitled to prevail under 42 U.S.C. § 1981. *See* Resp. Br. 1 n.1. Petitioner raised the claim in the district court[20] and never argued below that Section 1981 prohibited only the same conduct prohibited by the Equal Protection Clause, so there is nothing new about the contention that the terms of the statute prohibit conduct that the Equal Protection Clause does not. Moreover, the fact that the Court has held that Section 1981 reaches only purposeful conduct, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-90 (1982), does not mean that the statute reaches only the same purposeful conduct prohibited by the Fourteenth Amendment. Section 1981 remains an independent basis on which to reverse the judgment of the court of appeals.

[20] *See* Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment on Liability 37-38, filed May 3, 1999 (district court Record No. 94).

II. The Court of Appeals Should Have Reviewed and Affirmed the District Court's Findings Under the "Clearly Erroneous" Standard of Review and Should Not Have Reviewed the Findings *De Novo*.

The Law School seemingly has read right out of the case the second question presented in the petition that this Court granted – whether the court of appeals erred in reviewing the district court's findings after a trial under a *de novo*, rather than the clearly erroneous, standard of review.[21] The Law School elides the point by contending that there is "no genuine dispute in this case about the historical facts," Resp. Br. 1, but then it proceeds to dispute facts actually found by the district court.

For example, respondents dispute the district court's finding that the Law School effectively reserves seats for members of the favored minority groups.[22] Pet. App. 249a; Resp. Br. 41 n.9. They do so also with respect to the district court's findings on the identity of the racial and ethnic groups included within the preferences. Pet. App. 249a; Resp. Br. 49 n.79. In the latter case, respondents falsely imply that the dispute is with petitioner only, and not with the district court. Resp. Br. 49 n.79. They persist in suggesting that petitioner and her statistical expert created the racial and ethnic categories into which the evidence on admissions data is organized, when it is the

[21] Neither of respondents' merits briefs identify anywhere the second question presented for review.

[22] Respondents assert that the district court's finding that the Law School has "effectively reserved" approximately 10% of the seats in each entering class for the preferred minorities, Pet. App. 249a, is inconsistent with its finding that there are no "fixed" number of seats reserved. Resp. Br. 8, 40. This is disingenuous, as in the same sentence quoted by respondents, the district court noted that "there is no principled difference between a fixed number of seats and an essentially fixed minimum percentage figure." Pet. App. 248a.

Law School that not only maintains these categories, but also keeps daily track of decisions on admissions and acceptances for each group.[23] Finally, respondents' assertion that the "Law School has studied th[e] issue of [race-neutral alternatives] for many years," Resp. Br. 33-34, is another contradiction of the district court's findings. *See* Pet. App. 251a. The mere fact that some of respondents' witnesses testified during trial that they did not believe race-neutral alternatives were feasible is not at all inconsistent with the district court's finding that respondents had not considered such alternatives prior to implementing their preferences.

In arguing with the findings of the district court, respondents implicitly acknowledge that those findings are incompatible with a conclusion that respondents' racial preferences are lawful. By failing to directly address the second question presented in the petition, it is reasonable to conclude that respondents have effectively conceded that the court of appeals erred in application of a *de novo* standard of review.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests this Court to reverse the judgment of the court of appeals.

[23] Respondents newly contend, with no citation to the record, that the categories it maintains are only for compliance with legal requirements and ABA standards. Resp. Br. 43 n.70. This hardly explains the need to track data daily; it also contradicts the testimony of respondents' admissions director, who made clear that the daily tracking is used to help the Law School get its "critical mass", Cir. App. 7334; and more importantly, it is another instance of respondents taking issue with a factual finding of the district court, *see* Pet. App. 230a, without explaining how the finding is "clearly erroneous."

Respectfully submitted,

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